



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 30, 2004

Ms. Sheila I. Limon
Assistant City Attorney
Barney Knight & Associates
Executive Office Terrace
223 West Anderson Lane, Suite A-105
Austin, Texas 78752

OR2004-7388

Dear Ms. Limon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 208138.

The City of Cameron (the "city"), which you represent, received a request for eight categories of information regarding correspondence related to a specific railroad crossing, in particular "any and all notes, memos, or any writings whatsoever in [the city's] possession regarding the crossing in question." You state that you have provided the requestor with some of the requested information. You claim that the submitted information is not responsive to the present request. You further claim that to the extent this office may find the submitted information to be responsive to the request, the information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released).

¹ Although the city also claims that the submitted information is excepted from disclosure under section 552.022 of the Government Code, this section is not an exception to disclosure but is instead an illustrative list of types of information that are super public. *See Gov't Code § 552.022.*

We begin by addressing your claim that the submitted information is not responsive to the request. The Public Information Act (the "Act") requires a governmental body to release only information that it believes to be responsive to a request. However, in determining whether information is responsive, a governmental body has a duty to make a good faith effort to relate the request to information that it holds. Open Records Decision No. 590 at 1 n. 1 (1991). We have reviewed the submitted information and conclude that it is responsive to the request.

We next address the procedural requirements of section 552.301 of the Government Code. You acknowledge, and we agree, that the city failed to seek an open records decision from this office within the statutory ten-day period. *See* Gov't Code § 552.301(b). In addition, you failed to submit, within fifteen business days, the city's written comments explaining why its claimed exceptions apply and the requested records. *See* Gov't Code § 552.301(e)(1)(A), (D). The city's delay in this matter results in the presumption that the requested information is public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The city must demonstrate a compelling interest in order to overcome the presumption that the requested information is now public. Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the city claims that the requested information is excepted from disclosure pursuant to sections 552.103, 552.107, and 552.111 of the Government Code, we note that these exceptions are discretionary exceptions to disclosure under the Act and are waived by a governmental body's failure to comply with section 552.301.² Accordingly, we conclude that the city may not withhold any portion of the submitted information under sections 552.103, 552.107, or 552.111 of the Government Code. The city also raises section 552.101 of the Government Code as an exception to disclosure. Ordinarily, this exception provides a compelling reason for overcoming the presumption of openness. However, the city has not provided any arguments to explain the applicability of section 552.101 to the submitted information. Therefore, the city has not demonstrated that any of the submitted information is excepted from disclosure under section 552.101 of the Government Code. *See* Gov't Code § 552.301(e). As the city raises no further exceptions to disclosure, we conclude the submitted information must be released to the requestor.

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general); *see also* *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not generally provide compelling reasons for withholding requested information from disclosure.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

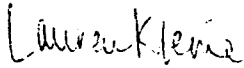
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lauren E. Kleine".

Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/seg

Ref: ID# 208138

Enc. Submitted documents

c: Mr. William R. Floyd
McLeod, Alexander, Powel & Apffel
P.O. Box 629
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(w/o enclosures)